U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0441

PHILLIP MACKEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELLER-ITO STEVEDORING COMPANY	)	
	)	
and	)	DATE ISSUED: Aug. 31, 2015
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Phillip Mackey, Miami, Florida, *pro se*.

Robert L. Bamdas (Kelley Kronenberg, P.A.), West Palm Beach, Florida, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2013-LHC-00652, 2013-LHC-01651) of Administrative Law Judge Linda S. Chapman rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that he injured his back while working for employer as a longshoreman on August 18 and September 28, 2012. Specifically, claimant testified that on August 18, 2012, he was thrown against a container while tying chains, and on September 28, 2012, he felt and heard a pop in his back while tying a chain to a trailer, and his back gave out. Tr. at 46, 51; EXs 5, 6. Claimant did not immediately seek treatment for his August 18 injury and did not miss time from work; however, he treated at the emergency room at Mercy Hospital after the alleged September 28 injury, where he was diagnosed with a sprained back and prescribed Flexeril and Motrin. Tr. at 47, 53; CX 3; EX 4.

In the interim between the two alleged work accidents, claimant was struck by a car while riding a bicycle on September 15, 2012. Tr. at 49. He was treated at the scene by a fire and rescue crew, to whom claimant complained of left leg pain caused by the bicycle accident and chronic back pain unrelated to the bicycle accident. EX 2 at 4. Three days later, on September 18, 2012, claimant went to the emergency room at North Shore Medical Center, complaining of back and leg pain. EX 1 at 357, 361. He was given anti-inflammatories and had x-rays taken of his back and left leg. EX 1 at 371-376. Claimant returned to North Shore Medical Center on September 26, 2012, again complaining of back pain, which he rated as a 10 out of 10 on the pain scale. EX 1 at 398. He was diagnosed with contusions and chronic back pain. EX 1 at 407. Claimant continued to work his regular job and did not miss time from work following his bicycle accident until September 28, 2012, when he alleged he suffered the second accident at work. Claimant did not return to work after this date. EX 10.

Pursuant to employer's objections at the May 20, 2014 hearing, the administrative law judge excluded from evidence Claimant's Exhibits 5-7. The administrative law judge excluded Claimant's Exhibits 5 and 6 because they were not provided to employer's counsel prior to the hearing in accordance with the administrative law judge's pre-hearing order.[1] Tr. at 14-18. The administrative law judge also excluded Claimant's Exhibit 7, a May 15, 2014 settlement offer to claimant. *Id.* at 21. Additionally, in her Decision and Order, the administrative law judge rejected as irrelevant claimant's post-hearing correspondence dated September 9, 2014.[2] Decision and Order at 14-15.

[1] Claimant's Exhibit 5 is a March 19, 2013 medical report by Dr. Krestow. Claimant's Exhibit 6 is a Florida Crash Report, dated September 15, 2012.

[2] Claimant's September 9, 2014 letter states that he receives medical care from the welfare office and is not receiving workmen's compensation benefits. Attached to this letter are discharge and care instructions from Jackson Health Systems, dated September 5, 2014, for a condition apparently unrelated to the back injury at issue in this claim. Also attached are a client service agreement with American Home Health Agency, Inc.,

In her Decision and Order, the administrative law judge found that claimant is not a credible witness and failed to establish that an accident occurred at work on September 28, 2012. However, as there were other indicia of reliability, the administrative law judge found claimant established that an incident occurred at work August 18, 2012. As the work-related incident on August 18, 2012, could have caused claimant's back pain, the administrative law judge found claimant established a prima facie case entitling him to the Section 20(a), 33 U.S.C. §920(a), presumption that his back pain is work-related. Decision and Order at 17-18. The administrative law judge found, however, that employer rebutted the presumption with the opinion of Dr. Baylis, employer's orthopedic expert, that claimant's back condition is the result of his bike accident and not his work accidents. Decision and Order at 17; EX 3 at 4; EX 16 at 17. Further, the administrative law judge observed that the only physician who attributed claimant's back condition to his employment is Dr. Hall, a neurosurgeon and claimant's treating physician, whose opinion the administrative law judge found was not creditable because Dr. Hall was not aware of the August 18 work incident or the September 15 bike accident. As no evidence supported claimant's claim of a work-related back condition, the administrative law judge denied benefits.[3] Claimant, who is without legal counsel, appeals the denial of benefits, and employer responds, urging affirmance.

We first address the administrative law judge's exclusion from the record of Claimant's Exhibits 5-7 and claimant's post-hearing submissions. Pursuant to 20 C.F.R. §702.338, "The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." *See also* 20 C.F.R. §702.339; 29 C.F.R. §18.82 (2015). The Board has held that an administrative law judge may, within her discretion, exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order. *See Collins v. Elec. Boat Corp*., 45 BRBS 79 (2011); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986); *cf. Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986) (the Board affirmed an administrative law judge's decision to admit employer's evidence into the record despite its non-compliance with a pre-hearing order since the order in question stated that such evidence *may* result in exclusion and the administrative law judge's decision was not arbitrary, capricious or an abuse of discretion). The Board may overturn determinations regarding the admission or exclusion of evidence only if they are

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authorizing home medical-care visits and listing various medications that were ordered for claimant on September 6, 2014.

[3] The administrative law judge additionally found that claimant failed to establish that he suffered any type of disability, as no physician issued work restrictions and Dr. Baylis concluded that claimant is able to perform his full-duty work. Decision and Order at 17; EX 16 at 18.

arbitrary, capricious, or based on an abuse of discretion. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

The administrative law judge rationally excluded Claimant's Exhibits 5 and 6 on the basis that they were not submitted within the time required by her pre-hearing order. Specifically, the administrative law judge's February 11, 2014, pre-hearing order set the date of the formal hearing for the week of May 19, 2014, and informed the parties that all exhibits intended to be offered into evidence "shall" be delivered to the opposing parties one week before the date of the hearing. Claimant submitted these documents for the first time at the formal hearing. Although claimant was not represented by counsel and he testified that he cannot read well, he stated he had help reviewing the administrative law judge's orders. Tr. at 44, 84-86. As the administrative law judge's decision to exclude this evidence is neither arbitrary, capricious, or an abuse of discretion, it is affirmed. *Collins*, 45 BRBS 79.

Similarly, the administrative law judge rationally excluded the settlement offer (Claimant's Exhibit 7), as well as claimant's September 9, 2014 letter with attached documents, as these documents were irrelevant to her consideration of the claim on the merits. Tr. at 20-21. The settlement offer does not concede claimant's entitlement to benefits or address the merits of his claims, and the September 9, 2014 letter and attachments do not address the injuries at issue in this case. Consequently, we affirm the administrative law judge's exclusion of this evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

We next address the administrative law judge's findings on the merits of claimant's claim. A claimant has the initial burden of proving the existence of a harm and an accident at work or working conditions which could have caused the harm in order to establish a prima facie case relating his injury to his employment. 33 U.S.C. §920(a); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a prima facie case, the employer may rebut the Section 20(a) presumption by producing substantial evidence ruling out the work accident as a cause of claimant's harm. *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). The employer may also rebut the presumption by producing substantial evidence that the claimant's condition was caused by a subsequent non-work-related event, which was not the natural or unavoidable result of the initial work injury. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion by a preponderance of the evidence. *See Universal Maritime Corp.*

v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, it is undisputed on appeal that claimant established a harm, back pain, and an incident occurred at work on August 18, 2012, that could have caused the harm. Thus, claimant has established a prima facie case relating his back condition to his employment. 33 U.S.C. §920(a); *Cline v. Huntington Ingalls, Inc. (Avondale Operations)*, 48 BRBS 5 (2013). We affirm, however, the administrative law judge's finding that claimant failed to establish that an accident occurred at work on September 28, 2012. The administrative law judge determined that no witnesses independently corroborated the occurrence of an incident at work on that date. Further, the administrative law judge rationally found claimant's allegation of a September 28 incident was not credible because claimant admitted he would, and did, lie to a government agency in order to obtain unemployment benefits,[4] and claimant failed to mention the September 15 bike accident or his September 26 treatment for severe back pain when treating at the emergency room on September 28. Decision and Order at 15; Tr. at 75-76. It is well established that the administrative law judge has discretion in weighing the evidence and drawing inferences therefrom. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 1221, 43 BRBS 21, 24(CRT) (11th Cir. 2009); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Based on this evidence, the administrative law judge's finding that claimant failed to establish that an accident occurred at work on September 28, 2012, is rational and supported by substantial evidence, and we affirm it. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Thus, if claimant's back condition is to be found work-related, it must have been caused or aggravated by the accident at work on August 18, 2012.

The administrative law judge found that employer rebutted the Section 20(a) presumption that claimant's back condition was caused or aggravated by the August 18 work incident. This finding is supported by the opinion of Dr. Baylis, who examined claimant on October 17, 2012. He attributed claimant's back pain entirely to the September 15 bike accident; Dr. Baylis stated that claimant's back pain was not due to the work incident. EX 16 at 15-18. As the opinion of Dr. Baylis constitutes substantial evidence ruling out a connection between claimant's back pain and the August 18 work accident, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *O'Kelley*, 34

[4] Claimant represented to the unemployment office that he was available to work and actively seeking employment when he was not. Tr. at 75-78.

BRBS 39; *see also Wright v. Connelly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

Once the Section 20(a) presumption is rebutted, claimant bears the burden of proving by a preponderance of the evidence that his back pain is related to the August 18, 2012 accident. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Although the administrative law judge did not specifically weigh the record as a whole in this case, the record contains no evidence linking claimant's back condition to the August 18 incident at work. Consequently, claimant cannot establish a causal connection between his back condition and this incident.[5] *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Moreover, substantial evidence supports the administrative law judge's findings that claimant failed to establish that he was disabled by back pain from the August 18, 2012 incident prior to the bicycle accident and that he does not require any medical care as a result of that incident at work.[6] Consequently, we affirm the administrative law judge's denial of benefits.

[5] The administrative law judge accurately stated that only Dr. Hall related claimant's back condition to his employment. Decision and Order at 17. As Dr. Hall related claimant's condition entirely to a September 28 work accident, which the administrative law judge found did not occur, and was not aware of the August 18 work incident, Dr. Hall's opinion cannot establish a causal relationship between claimant's back condition and the August 18 work incident. CX 8.

[6] Claimant did not miss any time from work after the August 18 work incident until September 28, after the occurrence of the bicycle accident. The administrative law judge properly found that no physician issued work restrictions and Dr. Baylis concluded that claimant was able to perform his full-duty work. Decision and Order at 17; EX 16 at 18. The administrative law judge also properly found that there is no evidence of record that claimant requires medical treatment for any work-related condition. Decision and Order at 18-19. The administrative law judge observed that claimant did not submit any medical bills for treatment for the August 18, 2012 incident prior to the occurrence of the bicycle accident. *Id*. at 19.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge